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9 THE COMPUTER MERCHANT, LTD.

10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN FRANCISCO DIVISION**

13 SALESFORCE.COM, INC., a Delaware
14 corporation,

15 Plaintiff,

16 vs.

17 THE COMPUTER MERCHANT, LTD., a
18 Massachusetts corporation,

19 Defendant.

20 AND RELATED COUNTERCLAIMS.
21

Case No.: 07-CV-03556-WHA

**ANSWER TO COUNTERCLAIM OF
DEFENDANT ASTADIA
CONSULTING, LLC; DEMAND FOR
JURY TRIAL**

1 Cross-Defendant The Computer Merchant, a Massachusetts corporation ("TCM"),
2 hereby responds to the Counterclaim of Astadia Consulting, LLC, ("Astadia") in this action (the
3 "Counterclaim"), and admits, denies, and alleges as follows:

4 **DENIALS AND GENERAL ALLEGATIONS**

5 1. TCM admits that this Court has jurisdiction of the original action predicated on 28
6 U.S.C. § 1332 in that all plaintiffs and all defendants are citizens of different states and the amount
7 in controversy, exclusive of interest and costs, exceeds the sum of \$150,000. TCM admits that the
8 forum selection clause of the contract between TCM and Salesforce.com, Inc. ("Salesforce")
9 provides as Plaintiff alleges, but denies that San Francisco or any other location in the Northern
10 District is an appropriate forum. The contracts at issue (one between TCM and Salesforce and one
11 between TCM and GrowthCircle, LLC), including the forum selection clause, were procured by
12 fraud or other false statement by Astadia, and others, and are therefore void or voidable by TCM.
13 The parties' agreements were made and entered into in Massachusetts as a result of Astadia's and
14 Salesforce's sales activities in Massachusetts. Astadia knowingly, willfully, and fraudulently,
15 materially misrepresented its ability, and the ability of Salesforce, to meet TCM's needs in a timely
16 and effective way and at a cost acceptable to TCM. TCM is informed and believes that Astadia
17 actively misrepresented and concealed its inability to meet TCM's needs by failing to disclose the
18 true capabilities and limitations of Salesforce's software and the true customization that would be
19 required to adapt it to TCM's needs. Astadia misrepresented both the benefits and the associated
20 costs of Salesforce's product and Astadia's services to TCM in other ways subject to proof at trial.
21 Salesforce's and Astadia's actions were intended to and did deceive TCM. Alternatively, Astadia
22 made representations that it had no reasonable grounds for believing to be true. Alternatively,
23 Astadia negligently misrepresented the facts as described above. TCM reasonably relied on
24 Astadia's statements and omissions, and was deceived into signing the contract at issue to purchase
25 the software and/or services at issue. All of these misrepresentations, omissions, and concealments
26 render the venue clause in the would-be agreement between TCM and Salesforce involuntary and
27 void or voidable by TCM. Salesforce filed this action in San Francisco only to achieve a venue
28 advantage in the case, and after TCM had made clear to Salesforce that TCM expected a full refund

1 and would file suit to get it if necessary. TCM denies that San Francisco or any other location in the
2 Northern District is an appropriate forum. TCM denies any remainder of Counterclaim ¶ 1.

3 2. TCM is informed and believes that Astadia is the legal successor to GrowthCircle. TCM
4 denies the validity and enforceability of the contract at issue, for the reasons set forth more fully in
5 paragraph 1 above. TCM denies the remainder of Counterclaim ¶ 2 for the reasons set forth in
6 paragraph 1.

7 3. TCM is informed and believes that Astadia is the legal successor to GrowthCircle. TCM
8 denies the validity and enforceability of the contract at issue, for the reasons set forth more fully in
9 paragraph 1. TCM denies the remainder of Counterclaim ¶ 3 for the reasons set forth in paragraph
10 1.

11 4. TCM admits that Astadia billed TCM for certain services, that TCM has declined to pay
12 Astadia for some of the services for which Astadia billed, and that TCM has demanded that Astadia
13 pay damages to TCM reflecting sums TCM already paid to Astadia and other sums. TCM denies
14 the remaining allegations of Complaint ¶ 4.

15 5. Answering Counterclaim ¶ 5, TCM incorporates paragraphs 1 through 4 above as though
16 repeated here.

17 6. TCM denies all the allegations of Counterclaim ¶ 6.

18 7. Answering Counterclaim ¶ 7, TCM admits that it has refused to make further payments
19 to Astadia and that TCM has demanded all its money back and more. TCM denies that it breached
20 the parties' agreement. The agreement is void or voidable, and must be rescinded, based on
21 Astadia's and Salesforce's fraud as described in paragraph 1 above. Further, were the agreement
22 valid, Astadia breached the parties' agreement by failing to deliver what it promised, or to do so at
23 the price promised, or at the associated-cost promised, or within the time promised. Accordingly,
24 Astadia committed the first material breach of the agreement. Moreover, despite repeated demands
25 from TCM that Astadia cure its defaults, Astadia failed to do so and, in fact, TCM is informed and
26 believes Astadia simply cannot do so because the software/services provided by Salesforce and
27 Astadia are not designed to provide the service that TCM needs and Salesforce and Astadia
28 promised, and any customization that might allow them to perform the needed functions would not

1 allow them to perform the needed functions at the cost and failure risk, and within the timeframe
2 promised. TCM denies all remaining allegations of Complaint ¶ 7.

3 8. TCM denies all the allegations of Counterclaim ¶ 8.

4 9. Answering Counterclaim ¶ 9, TCM incorporates paragraphs 1 through 8 above as though
5 repeated here.

6 10. TCM denies all the allegations of Counterclaim ¶ 10.

7 11. Answering Counterclaim ¶ 11, TCM admits that it has refused to make further payments
8 to Astadia and that TCM has demanded all its money back and more. TCM denies that it breached
9 the parties' agreement and that the parties had any valid agreement. TCM denies all remaining of
10 the allegations of Counterclaim ¶ 11.

11 12. Answering Counterclaim ¶ 12, TCM incorporates paragraphs 1 through 8 above as
12 though repeated here.

13 13. TCM denies all the allegations of Counterclaim ¶ 13 (misnumbered as ¶ 10).

14 14. Answering Counterclaim ¶ 14 (misnumbered as ¶ 11), TCM admits that it has refused to
15 make further payments to Astadia and that TCM has demanded all its money back. TCM denies
16 that it breached the parties' agreement, or that the parties' had or have any valid agreement. TCM
17 denies all remaining allegations of Counterclaim ¶ 14.

18
19 **ALLEGATIONS COMMON TO ALL AFFIRMATIVE DEFENSES**

20 15. Defendant, counter-claimant, and counter-defendant The Computer Merchant, Ltd. is a
21 privately-held, Massachusetts-based staffing firm specializing in the placement of Information
22 Technology consultants in temporary and permanent job assignments.

23 16. Defendant, Salesforce.com, Inc. ("Salesforce"), is a large, publicly-held software
24 developer that markets and licenses a software application (the "Software") putatively designed to
25 allow companies like TCM to, among other things: track consultants' availability and clients' job
26 openings, match consultants to jobs based on their skills and location, and monitor the progress of
27 the consultants' work.

28

1 17. Counterdefendant Astadia Consulting, LLC, is the successor-in-interest to GrowthCircle,
2 LLC, and is a business that provides software installation, integration, and customization services.

3 18. In April 2006, Salesforce began aggressively marketing the Software to TCM as a
4 suitable replacement for TCM's current system. In connection with their discussions, TCM
5 furnished Salesforce with the source code for its system, as well as a detailed written list of its
6 specific business requirements. TCM further allowed Salesforce to interview its employees
7 concerning their daily tasks and needs and to observe those employees in performing their regular
8 job functions.

9 19. After purportedly analyzing all of that information, Salesforce's principal sales engineer,
10 Sal Caruso ("Caruso") advised TCM that the Software would enable TCM to perform its daily tasks
11 far more effectively than TCM's current software and that, consistent with TCM's desires as
12 communicated to Salesforce.com as Astadia, TCM would benefit from advanced built-in features of
13 Salesforce.com's product including, but not limited to:

14 a) the ability to search both consultant and client information using multiple keywords
15 simultaneously, to enable TCM to, among other things, easily match consultants to assignments
16 consistent with their technical skill sets;

17 b) integration with internet-based map services, such as Google Maps, to allow TCM
18 to place candidates in nearby assignments;

19 c) a user interface that would allow TCM's employees to simultaneously view many
20 pieces of related data, such as resumes and job descriptions;

21 d) the ability to constantly monitor information and alert TCM's employees to
22 important items, such as new client assignments, without any prompting by the user.

23 e) ease of business process configuration, repurposing of standard Salesforce features
24 and application extension utilizing AppExchange (on demand business applications), all
25 without the need for software development.

26 f) seamless integration of the Salesforce platform to TCM's other computer systems
27 and software.

28

1 20. Mr. Caruso made these statements to, among others, TCM's president, John Danieli
2 ("Danieli") and its Vice Presidents, Jay and Angela Powell (the "Powells"), during meetings held at
3 TCM's site in Norwell, Massachusetts in early May, 2006. These statements were false when made
4 and remain so today.

5 21. As part of this sales pitch, Salesforce even staged an elaborate demonstration of its
6 Software at TCM's offices on or about May 5, 2006 during which it purported to demonstrate these
7 features and others using information taken from TCM's databases. That demonstration was
8 deliberately calculated and designed to mislead TCM as to the Software's capabilities as applied to
9 TCM's business. The Software cannot perform for TCM the functions represented in paragraph 10
10 above and purportedly demonstrated on or about May 5, 2006 at TCM's offices without additional
11 hardware, software, and/or expensive custom software programming.

12 22. In addition, Salesforce falsely advised TCM that its Software, configured to perform as
13 described above, would be "hosted" off-site, i.e., that it would run on servers owned and operated
14 by Salesforce. This offered two key benefits: (a) it would save TCM substantial amounts of money
15 as it would not need to purchase, operate, or maintain new hardware; and (b) the risk of system
16 disruption due to hardware failure would be reduced as there would be fewer pieces of equipment
17 involved. But it proved to be false, at least as applied to TCM. All of the above-alleged
18 misrepresentations by Salesforce were made with the specific intent to defraud TCM.

19 23. During the course of its efforts to fraudulently sell the Software to TCM, Salesforce
20 introduced TCM to its so-called "premier" installation partner, GrowthCircle, LLC
21 ("GrowthCircle"). TCM's principals met with GrowthCircle's Managing Partner, Matthew Bruce
22 ("Bruce"), among others, during May and June, 2006 at TCM. During the course of those meetings,
23 Bruce joined Salesforce in falsely advising TCM that the Software would be up and running in just
24 three months, i.e., by Fall, 2006, as its basic design was already well-suited to TCM's needs and
25 required only minor "configuration." Bruce also agreed with and reiterated Salesforce's "pitch"
26 regarding the Software's functionality, as described above. Salesforce's Caruso was present at these
27 meetings and in turn agreed with Bruce's representations, thus making Salesforce's fraudulent
28 misrepresentations yet again. Bruce's statements were specifically intended to induce TCM's

1 reliance and to cause TCM to license Salesforce.com's software and to contract with GrowthCircle
2 to implement that software at a substantial revenue and profit to GrowthCircle.

3 24. TCM reasonably relied on Salesforce's and GrowthCircle's representations as to the
4 functionality, suitability, cost, and ease of installation of the Software. As a result, TCM executed a
5 "Master Subscription Agreement" ("MSA") with Salesforce, which provided for the purchase of
6 125 user licenses at a total cost of \$738,556.25 over three years. A copy of the MSA is attached
7 hereto as Exhibit "A." TCM even paid \$288,133.01 up front for the first year of the three year
8 subscription, although as described below TCM never received anything of value.

9 25. At Salesforce's request and in reliance on the false representations set forth above, TCM
10 also entered into a "Professional Services Agreement" ("PSA") with GrowthCircle, for the
11 implementation of the Software. A copy of the PSA is attached hereto as Exhibit "B."

12 26. Shortly after TCM signed the Professional Services Agreement, GrowthCircle merged
13 with a Texas company called MW Advisors, LLC to form the resulting defendant company,
14 Astadia. Astadia is the legal successor to GrowthCircle. It continued working under the PSA and,
15 as successor-in-interest to GrowthCircle, assumed the PSA and all liabilities to TCM.

16 27. Soon after Astadia began its implementation work in the fall of 2006 TCM discovered
17 that Salesforce's and Astadia's express representations about the Software's features, suitability,
18 integration, and ease of installation were false. Astadia struggled and ultimately failed to implement
19 the Software, and was finally forced to admit and admitted that:

20 a) the basic version of the Software would never be able to perform many of the
21 tasks necessary to meet TCM's known requirements, including some which Salesforce had
22 purported to demonstrate live to TCM, such as its resume or candidate search capabilities;

23 b) the Software could not be installed in three months and — rather than merely
24 "configuring" the system as promised — Astadia would have to develop extensive custom
25 software code; and

26 c) Salesforce's Software could not be used alone but required integration with other
27 software in three separately hosted software components at additional and previously
28 undisclosed expense to meet TCM's known requirements. To implement the Software,

1 TCM also would be forced to purchase third-party hardware at a cost of \$86,807.31 and
2 assume projected operating costs of another \$120,000 every year, costs that were not
3 disclosed by Salesforce and/or GrowthCircle before the contracts at issue were signed. On-
4 site hosting also would dramatically increase the risk of system failure due to many pieces of
5 hardware being cobbled together. It also would stunt processing speed resulting in a slower
6 software application and decreased productivity for TCM's sales people.

8 **AFFIRMATIVE DEFENSES**

9 TCM repeats paragraphs 15 through 27 above and incorporates all of them into each
10 affirmative defense asserted below, and on that basis claims a complete defense to each claim for
11 relief asserted in the Counterclaim on each of the following grounds:

12 28. Fraud in the Inducement. Astadia, through its predecessor GrowthCircle, fraudulently
13 induced TCM to enter into the PSA; it is therefore void or voidable, subject to rescission, and
14 unenforceable.

15 29. Mutual Mistake of Fact. TCM believes Astadia knew that Salesforce's SFA software
16 application could not and would not deliver the benefits Astadia promised to TCM, but nevertheless
17 fraudulently induced TCM to buy it with false representations that it would provide those benefits.
18 In the alternative, however, TCM alleges that Astadia actually believed what it said about
19 Salesforce's software, just as TCM did. Accordingly, there was a mutual mistake of fact that
20 defeated the formation of any agreement between Astadia and TCM.

21 30. Failure of Consideration/First Material Breach. The parties have no valid agreement
22 because of Astadia's fraud. In the alternative, the parties' agreement required Astadia to deliver
23 installation services that would, within the time and cost promised, provide the functionality, ease of
24 use, cost, and risk profile that Astadia promised to TCM. Astadia failed to deliver these promised
25 benefits and thus cannot enforce the agreement.

26 31. Setoff. Based on Astadia's above-described malfeasance, Astadia is liable to TCM
27 under various legal theories, and TCM has been damaged and/or Astadia unjustly enriched in an
28 amount subject to proof at trial. TCM is entitled to a setoff in this amount.


PRAYER FOR RELIEF

Wherefore, Defendant TCM, as and to the extent supported by the applicable foregoing denials and affirmative defenses, prays that the Court:

1. Deny the relief sought in the Counterclaim and dismiss it with prejudice;
2. Award TCM its costs of suit; and
3. Order such other and further relief as the Court deems just and proper.

GALLO & ASSOCIATES

Dated: October 15, 2007

By: 
Ray E. Gallo
Hilari H. Hanamaikai
Attorneys for Defendant,
Counterclaimant, and
Counterdefendant, THE COMPUTER
MERCHANT, LTD.

Demand for Jury Trial

Counter-Defendant The Computer Merchant, Ltd., hereby demands a jury trial of all issues so triable.

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